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No. 02-361

In the Supreme Court of the United States

UNITED STATES OF AMERICA, *ET AL.*,
Appellants,

v.

AMERICAN LIBRARY ASSOCIATION, INC., *ET AL.*,
Appellees.

On Direct Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF OF THE STATE OF TEXAS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether public libraries' use of filtering devices on computers used by library patrons for Internet access violates those patrons' rights under the First Amendment.

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BRIEF OF THE STATE OF TEXAS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

The State of Texas, as *amicus curiae*, files this brief in support of Appellants and asks the Court to reverse the judgment of the lower court and hold that public libraries may constitutionally utilize Internet filtering software on computers used by library patrons.

INTEREST OF *AMICUS CURIAE*

The First Amendment issue in this case is of great importance to the people of Texas. The lower court's erroneous decision that the First Amendment prohibits public libraries from utilizing filtering software on computers used by library patrons for access to the Internet will likely result in children being exposed to obscene, indecent, and harmful material—and inhibit efforts to combat Internet-related crimes against children. Moreover, the

lower court's erroneous First Amendment holding could prevent Texas from enacting and enforcing, as an exercise of its police powers, laws mandating or even encouraging use of filtering software in its public libraries. It also will restrain public libraries from enforcing Internet use policies that regulate what content may be accessed. Texas does not prescribe specific Internet use policies for its libraries, but instead encourages libraries to formulate policies that reflect individual community standards. Texas, other states, the federal government, and individual libraries must retain the ability to protect children from exposure to the enormous amount of pornographic and other harmful material present on the Internet.

Texas has placed a high priority on the prevention and prosecution of computer and Internet-related crime, including child pornography. Two years ago the Texas Attorney General created the Internet Bureau to assist local law-enforcement agencies in combating computer and Internet-related crimes. The mission of the Internet Bureau is to ensure a safe electronic environment for the communication of information and ideas and the transaction of commerce. The lower court's ruling—that libraries and, by extension, other governmental entities may not use Internet-filtering on computers available for public use—threatens this goal. The Court should reverse the lower court's judgment and hold that Internet filtering does not offend the First Amendment. Otherwise, Texas, other states, and individual public libraries will be severely hampered in their efforts to protect children from the effects of Internet pornography and the predators that free, filterless Internet-access will attract to public libraries.

SUMMARY OF THE ARGUMENT

This case presents an important question under the First Amendment. The lower court erroneously held unconstitutional a public library's utilization of Internet filtering software on computer terminals available for public use. *See Am. Library Ass'n, Inc. v. United States*, 201 F.Supp.2d 401, 484 (E.D. Pa. 2002). The purpose of filtering software is to block access to material that is pornographic, indecent, or harmful to minors. Focusing solely on the nature of the Internet and disregarding the setting in which the Internet was accessed, the lower court incorrectly applied strict scrutiny to a library's decision to employ filtering software and held that the decision violated the First Amendment. *See id.* In applying strict scrutiny, the lower court emphasized the *quasi*-traditional-public-forum character of the Internet, ignoring—in neglect of this Court's precedent—the public-library environment where Internet access takes place. *See id.*, at 470.

Forum analysis, however, is inappropriate in this case because libraries' provision of limited Internet access does not create a forum at all. Instead, the decision to limit Internet offerings in the library is a decision about the content of the library's collection and is analogous to the selection of books and other materials. And rational basis—not strict scrutiny—is the appropriate standard to review a library's decisions regarding its print collection. Because print-collection decisions receive only rational-basis review, so should determinations about the portions of the Internet that patrons can—or cannot—access on library computers. Protecting children from sexually-explicit material on the Internet is undoubtedly a rational basis for using Internet filtering software. Therefore, the Court should reverse the lower court's decision.

ARGUMENT

This case presents a challenge to the facial validity of two provisions of the Children's Internet Protection Act (CIPA), under which public libraries that receive federal assistance for Internet access must use filtering software to prevent library patrons from accessing obscene visual depictions, child pornography, and other visual depictions harmful to minors. *See* 20 U.S.C. §9134(f)(1)(A)(i) & (B)(i); 47 U.S.C. §254(h)(6)(B)(i) & (C)(i) (Supp. V 1999).

The lower court analyzed the constitutionality of the two CIPA provisions under the Spending Clause framework that the Court set forth in *South Dakota v. Dole*, 483 U.S. 203, 207-10 (1987). *See Am. Library Ass'n*, 201 F.Supp.2d, at 409, 450-51. In *Dole*, this Court held that Congress may not use its spending power "to induce the States to engage in activities that would themselves be unconstitutional." *Dole*, 483 U.S., at 210. Upon finding that public libraries that comply with CIPA violate the First Amendment rights of their patrons, the lower court concluded that the two challenged CIPA provisions were facially unconstitutional and enjoined their enforcement. *See Am. Library Ass'n*, 201 F.Supp.2d, at 496. That decision was erroneous.

I. CONGRESS—AND STATES—MUST HAVE THE ABILITY TO COMBAT THE SERIOUS PROBLEM OF CHILDREN'S ACCESS TO SEXUALLY-EXPLICIT MATERIAL ON THE INTERNET.

"There is a vast amount of sexually explicit material available via the Internet." *Id.*, at 419. And children are seeing this material because it is easy—and often free—to access. *See id.* There are approximately 100,000 web sites offering free sexually-explicit material on the Internet. *Id.* As one commentator notes, "[t]he great majority of pornographic websites are actually free and serve as 'bait' or 'teasers' meant to lure people into the commercial websites." Mark C. Alexander, *The First Amendment and*

Problems of Political Viability: the Case of Internet Pornography, 25 HARV. J. L. & PUB. POL'Y 977, 982 (2002). In fact, free pornographic websites make up 70 to 80 percent of online pornography. *Id.*, at 982 n.21. Therefore, "children online may have free and unhindered access to almost all of the available adult content on the Internet." *Id.*

The problem that the astounding amount and accessibility of sexually-explicit images online creates is compounded by the ever-increasing number of children who use the Internet. In the United States, an estimated 17 million, or 73 percent, of 12 to 17-year-olds use the Internet. *Id.*, at 980-81. And a growing number of very young children are online as well. *Id.*, at 981. One study concluded that 14 percent of children who use the Internet are five years old or younger. *Id.*, at n.15.

The sexually-explicit material our children are seeing is not limited to text. It ranges from "commonplace pornographic magazine still-frames to interactive sexual encounters." *Id.*, at 982. For example, one site advertised a live broadcast of a young couple losing their virginity together. *Id.* Another site depicted a woman having sex with an animal. DAVID FINKELHOR *ET AL.*, CRIMES AGAINST CHILDREN RESEARCH CENTER, ONLINE VICTIMIZATION: A REPORT ON THE NATION'S YOUTH 15 (2000).

Children inadvertently encounter this material online. Based on interviews with a nationally representative sample of 1,501 young people ages 10 to 17 who used the Internet regularly, the National Center for Missing and Exploited Children and the Crimes Against Children Research Center found that one in four children had experienced an unwanted exposure to indecent pictures in the previous year. FINKELHOR *ET AL.*, ONLINE VICTIMIZATION, at 13. Indeed, accidental exposure to sexually explicit websites is difficult to avoid. *Am. Library Ass'n*, 201 F.Supp.2d., at 419. And unintentional viewing of such material can be harmful to children.

Of the children interviewed who had accidentally accessed pornographic pictures, 23 percent reported that they were "very or extremely upset by the exposure." FINKELHOR *ET AL.*, ONLINE VICTIMIZATION, at 16.

The significant number of children who unintentionally encounter sexually explicit pictures on the Internet is understandable given the innocuous names of many pornographic websites, such as www.whitehouse.com; www.sleepingbeauty.com; www.boys.com; and www.girls.com. *See* Alexander, 25 HARV. J. L. & PUB. POL'Y, at 983; *Am. Library Ass'n*, 201 F.Supp.2d, at 419. On these sites, instead of the President's home or a fairy-tale princess, children see sexually-explicit pictures. *See* Alexander, 25 HARV. J. L. & PUB. POL'Y, at 983; *Am. Library Ass'n*, 201 F.Supp.2d, at 419.

Yet inadvertent exposure is only the beginning of the problem. Children are also intentionally searching out indecent material. The lower court credited a study of Internet use at one library showing that "users between the ages of 11 and 15 accounted for 41% of the filter blocks that occurred on library computers." *Am. Library Ass'n*, 201 F.Supp.2d, at 423. The study concluded that "children and young teens were actively seeking to access sexually explicit images in the library." *Id.*

Furthermore, there can be "secondary" effects to permitting access to pornographic and other harmful Internet material in libraries. Testimony at trial suggested that "unfiltered Internet access had led to occurrences of criminal or otherwise inappropriate conduct by library patrons, such as public masturbation, and harassment of library staff and patrons, sometimes rising to the level of physical assault." *Id.* at 474. There is no doubt that such conduct poses a physical and psychological danger to all library staff and patrons—especially children.

States, as well as the federal and local governments, have a strong interest in protecting children from viewing—in public libraries—the vast amount of sexually explicit material available over the Internet. They have an equally strong interest in protecting children from the secondary effects of the availability of these materials, such as the attraction to libraries or similar public places of persons who might victimize children. *Cf. City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-49 (1986) (upholding zoning restrictions on adult theaters because such restrictions were aimed at preventing secondary, rather than primary, effects of such theaters). The ability to filter these materials through the use of software is an important weapon in States' and libraries' child-protection arsenals and should not be prohibited.

Congress has already tried—unsuccessfully—to combat Internet pornography by directly regulating Internet content. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997). In contrast to the statute at issue in *Reno*, CIPA does not affect the content of the Internet, but only restricts what patrons can view in public libraries. Thus, Congress's second attempt at addressing the problem of children's access to indecent Internet material is significantly narrower and geared toward passing constitutional muster. If it does not pass, governmental entities and public libraries will be impaired in their efforts to shield children from the harmful effects of Internet pornography.

Simply put, public libraries cannot become places where there is a very real risk that children could be exposed—intentionally or unintentionally—to obscene, pornographic, or otherwise harmful materials. Parents should not be afraid to send their children to the library, either because they might be exposed to such materials or because the library's free, filterless computers might attract people with a propensity to victimize children. Although, at present, filtering may be an imperfect technology, it remains a valuable and

reasonable tool for protecting children, and its use should not be forbidden to public libraries or to governmental entities.

II. RATIONAL BASIS—NOT STRICT SCRUTINY—SHOULD APPLY TO A PUBLIC LIBRARY'S FILTERING OF OBSCENE, INDECENT, OR HARMFUL MATERIAL FROM PUBLICALLY PROVIDED INTERNET ACCESS.

Of the three types of fora recognized in First Amendment jurisprudence—the traditional public forum, the limited or designated public forum, and the nonpublic forum—strict scrutiny applies only in the traditional public forum, which comprises locations such as streets and parks. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). Any restriction on speech in a traditional public forum must be narrowly tailored to achieve a compelling governmental interest. *See id.* A limited or designated public forum, on the other hand, may be limited to certain purposes, provided that any restrictions on speech are reasonable with respect to those purposes and provided that the restrictions are viewpoint neutral. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). And, in a nonpublic forum, speech restrictions may be based not only on content but also on "speaker identity" as long as the restrictions are "reasonable in light of the purpose served by the forum" and viewpoint neutral. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)). Correctly defining the forum is vital because the government's ability to limit speech varies with the nature of the forum. *See Cornelius*, 473 U.S., at 797.

The lower court incorrectly identified the forum in this case, resulting in the erroneous application of strict scrutiny. *See Am. Library Ass'n*, 201 F.Supp.2d, at 470. The lower court likened the Internet to a traditional public forum, stating, "[b]y providing its

patrons with Internet access, public libraries create a forum in which any member of the public may receive speech from anyone around the world who wishes to disseminate information over the Internet." *Id.* In deciding to apply strict scrutiny based solely on the character of the Internet, the court erroneously ignored the context in which the Internet is accessed—in this case, the public library. This Court has recognized that the standard of review for restrictions on speech cannot be determined without reference to the context of the speech. While Internet filtering might properly be subject to strict scrutiny in other settings, it should be judged by a lesser standard when the Internet is accessed at a public library.

Although the lower court determined that a public library is a designated public forum, *see id.*, at 457, it did not apply the "reasonableness" and viewpoint neutrality test necessitated by that forum. Instead, the lower court mistakenly held that publically provided Internet access creates something akin to a traditional public forum within the designated public forum of the library, requiring the application of strict scrutiny. "We are satisfied that when the government provides Internet access in a public library, it has created a designated public forum," *id.*, at 457, but "[i]n providing even filtered Internet access, public libraries create a public forum open to any speaker around the world to communicate with library patrons." *Id.*, at 410; *see id.*, at 466-70 (analogizing the Internet to traditional public fora).

The lower court conceded that a public library's content-based selection of books and other materials for its collection does not trigger strict scrutiny. *See Am. Library Ass'n*, 201 F.Supp.2d, at 462. The court held, nonetheless, that determinations of Internet content offered by public libraries are subject to strict scrutiny. *Id.*, at 463-66. The lower court distinguished the library's print collection from its Internet offerings on the ground that the library does not make individualized judgments regarding the value of web sites it makes available. *Id.*, at 463.

The lower court then held that "under the public forum doctrine," *id.*, at 489, the filtering was not narrowly tailored to meet a compelling governmental interest because material other than that which is pornographic, obscene, or harmful could be blocked. *See id.*, at 470-84, 489. The lower court held that filtering was not narrowly tailored despite evidence that less than one percent of Internet sites were blocked by some filtering software. *See id.*, at 438-39.

By focusing solely on the Internet while ignoring the library environment in which the Internet was accessed, the lower court's decision runs afoul of the Court's admonition that context is *always* a central concern when determining the permissibility of restrictions on speech. *See, e.g., Fed. Communications Comm'n v. Pacifica Found.*, 438 U.S. 726, 746-47 (1978) ("Indeed, we may assume, *arguendo*, that [the George Carlin "filthy words"] monologue would be protected in other contexts. Nonetheless, the constitutional protection accorded to a communication . . . need not be the same in every context.").

Moreover, the lower court's *per se* characterization of the Internet as akin to a traditional public forum—and its rote application of strict scrutiny, despite the library context in which the Internet is accessed—has troubling implications. For instance, under the lower court's analysis, a school's decision to utilize Internet filtering software would be subject to strict scrutiny. It would be immaterial that schools are not considered to be traditional public fora. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390-93 (1993) (school was not a public forum as to after-hours access by various groups). Strict scrutiny would be required solely because of the lower court's view that the Internet should be analyzed, *per se*, in the same way as a traditional public forum, regardless of the context in which it is accessed.

The appropriate level of scrutiny should be decided with reference to the entire context of the speech that is restricted. *See Pacifica*, 438 U.S., at 746-47. Context matters because "[i]t is a characteristic of speech such as this that both its capacity to offend and its 'social value' . . . vary with the circumstances." *Id.* Thus, the public library environment in which the Internet is accessed is of critical importance in determining the proper forum and cannot be ignored.

Even though the lower court erred in conducting forum analysis, the Court need not ascertain the proper forum to decide the issue in this case because forum analysis should not apply at all. By offering limited Internet access, public libraries do not create a forum. Instead, they make a decision about what Internet materials to include in their collections. And rational basis—not strict scrutiny—is the appropriate standard for reviewing public libraries' choice of books and other materials for their collections.

Subjecting public libraries to strict scrutiny for discretionary decisions regarding what information to provide library patrons is inconsistent with the tradition and mission of public libraries. Indeed, an essential role of librarians is to make value decisions to determine library offerings. Also, public libraries—as entities with limited financial resources, limited space, and limited missions—must make decisions that limit information provided to patrons. Determinations as to offerings are therefore an inherent and required obligation of public libraries. *See generally Am. Library Ass'n*, 201 F.Supp.2d, at 421.

Consistent with the necessity of limiting public library offerings and with the responsibility libraries owe to their communities, the vast majority of libraries limit the amount of pornographic material offered to patrons. *See Am. Library Ass'n*, 201 F.Supp.2d, at 420. For example, evidence at trial showed only eight libraries nationwide that subscribed to *Hustler* magazine. *Id.* Because

libraries must continually make discretionary decisions about their collections, limitations on the provision of pornographic material should not be subjected to strict scrutiny.

Applying strict scrutiny to determinations of library offerings conflicts with the traditional and necessary role of librarians to limit their collections. Notably, this Court has never held that forum analysis—much less strict scrutiny—applies to the determination of offerings by public libraries. And there is no reason to treat a library's Internet offerings any differently than its collection of books, videos, CD-ROMs, and magazines.

By connecting a library computer terminal to the Internet, public libraries do not invite broad discussion or publication of materials of all content. Instead, libraries invite discussion of topics that fit their mission of facilitating learning and cultural enrichment. This is apparent from libraries' Internet use policies that, in many instances, broadly restrict permissible uses. For example, libraries frequently prohibit users from checking e-mail or participating in chat rooms. *See id.*, at 422. Some libraries prevent users from using public library computers to play video games or visit on-line dating services. *Id.* Such restrictions reflect public libraries' desire, among other things, to limit Internet use to educational and cultural topics. Although eminently reasonable, such restrictions affect a media that the district court has termed the equivalent of a traditional public forum and are thus subject to strict scrutiny. Under the district court's incorrect interpretation of the First Amendment, therefore, libraries that prevent their computers from being used to play Internet-based video games violate the constitutional rights of their patrons. Such an interpretation would rob libraries of all discretion to impose reasonable restrictions on Internet use.

Other absurd results could also follow from the lower court's analysis. For instance, because no meaningful difference exists

between access to Internet terminals and access to other electronic media, such as cable televisions or even telephones, the strict scrutiny applicable to the Internet could apply to those media as well. Therefore, a public library that provides access to a telephone would be unable to restrict access to 1-900 numbers unless the librarians individually previewed each telephone number that could or could not be accessed. Similarly, a public library that subscribed to cable television but prohibited access to channels that show nudity would be required to justify its decision under strict scrutiny.

Collection decisions of a library should be subject only to rational basis review; therefore, similar decisions about the content of Internet material made available to patrons should also be subject to rational basis review. Protecting children from the vast amount of sexually-explicit material on the Internet is undoubtedly a rational basis for the use of Internet filtering software. Accordingly, the filtering required by CIPA does not offend the First Amendment.

CONCLUSION

The judgment of the lower court should be reversed.

Respectfully submitted,

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